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Findings From the Mediadem Project: Supporting Free and Independent Media in Europe

Introduction

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This editorial introduces the four articles of this Special Section that draw on studies carried out for the European research project “European Media Policies Revisited: Valuing & Reclaiming Free and Independent Media in Contemporary Democratic Systems” (MEDIADEM). The project explored the factors that promote or hinder media freedom and independence in 14 European countries. The articles consider how the diversity of media markets and the independence of the media from political and commercial influence can be supported by legal and nonlegal means at international (particularly European), national, and substate levels. In particular, they focus on 3 key themes that were central to the research project: the future of journalism in Europe and, in particular, the position of the media and journalists in the postcommunist states in Europe; how the established tradition of public service broadcasting in Europe is adapting to political and technological changes; and how well placed existing regulatory frameworks are to address the increasingly important regulatory role of private operators in Europe.

Keywords: public service media, media freedom and independence, ethical journalism, employment terms, media governance

This collection of articles stems from the Mediadem research project, established to explore the economic, social, political, and legal factors that promote, or conversely hinder, the development of free and independent media across Europe. The project, which received financial support from the European Union under the Seventh Framework Programme, focused on 14 countries, chosen to reflect the diversity of media regulatory models that exist in the region. Eight of these countries had been categorized by Daniel C. Hallin and Paolo Mancini in their book *Comparing Media Systems: Three Models of Media and Politics* as exemplifying one or other of their three regulatory models: Greece, Italy, and Spain, the “Mediterranean or polarized pluralist model”; Belgium, Denmark, Finland, and Germany, the “Northern European” or “democratic corporatist model”; and the United Kingdom, the “North Atlantic” or “liberal model” (Hallin & Mancini, 2004). One object of the project was to explore how relevant and representative

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these “ideal type” categorizations continue to be in a rapidly changing media environment. But the project cast its net wider than these eight established European Union member states and also examined the media in a number of Central and Eastern European countries—Bulgaria, Estonia, Romania, and Slovakia—all of which had to adapt swiftly to the transition to democracy in the final years of the 20th century. These four states joined the European Union between 2004 and 2007. The final two states included in the project, Croatia and Turkey, were, at the start of the project, European Union applicant states, though Croatia became a member in 2013. The project, which ran from April 2010 to March 2013, led to the publication of detailed country studies, comparative analyses, and policy proposals, all of which are detailed on the Mediadem website.¹

The four articles included in this collection explore how the diversity of media markets and the independence of the media from political and commercial influence can be supported by legal and nonlegal means at international (particularly European), national, and substate levels. What scope is there to alter the nature of media systems, heavily influenced, as Hallin and Mancini argue, by political, cultural and economic factors, to nurture the provision of services that respond to the needs of citizens as well as consumers? Drawing on the research undertaken for the Mediadem project, the articles consider, first, the future of public service media provision in Europe and the extent to which particular legal structures and standards, many already well identified at the international level, can be used to direct its development; second, how journalistic ethics can be nurtured and maintained in today’s highly competitive, and often financially stretched, media markets; and, third, the constitutional limits of state regulation and the role of self-regulation in a media environment dominated by a handful of powerful private corporations.

The first article by Psychogiopoulou, Anagnostou, Craufurd Smith, and Stolte explores the evolution of the public service broadcasting ethos in the various Mediadem countries. Given the gradual extension of public service provision beyond broadcast radio and television to online text and audiovisual services, it is now often more accurate to use the term *public service media*. The degree and nature of public service provision is a key indicator of the willingness of states to intervene in the media sector and is thus one of the factors considered by Hallin and Mancini when identifying specific media systems. As one would expect, the exact status afforded public service media in the Mediadem countries varies significantly depending on the constitutional framework, political and social history, and economic conditions. In Germany, for example, the Federal Constitutional Court has held that public service broadcasting is a required component of the broadcasting order, providing an indispensable basic service that contributes positively to content diversity.² In other countries, such as the UK, the survival of public service media ultimately depends on political, and thus to some extent also popular, support; a matter of some concern in the run up to the renewal of the BBC’s Charter at the start of 2017 (Martinson, 2015; UK Parliament, 2015). The European Court of Human Rights (ECtHR) has recognized the importance of public service broadcasting in enhancing media pluralism and citizens’ access to information, but has to date stopped short of holding that states are actually *required* to make provision for such a service where other means are employed to ensure the realization of these democratic goals.³

¹ See <http://www.mediadem.eliamep.gr/>

² BVerfGE 73, 118 1 BvR 1/84 4. Rundfunkurteil “Fourth Broadcasting Case,” November 4, 1986.

³ *Manole v. Moldova*, App. No. 13936/02, December 17, 2009, para. 100.

Although international organizations such as the Council of Europe have produced detailed guidance relating to the remit, regulatory framework, and funding of public service media, it is apparent from the Mediadem study that these guidelines find only partial and variable reflection in practice. The Mediadem countries have, for example, diverged in their willingness to afford a broad remit to public service media with, most notably, the German public service broadcasters prohibited from providing “nonprogram-related press-like” services. Funding arrangements vary, though with a trend toward increasing reliance on state funds, and only a minority of the countries studied have adopted public value tests for new services, along the lines supported by the European Commission. Perhaps the most marked variation can be seen in the way in which the management and supervisory bodies of the public service media organizations are structured and operate, with two rather different approaches in evidence. At one end of the spectrum, we can see countries that have put in place supervisory bodies with limited direct political representation and a focus on technical capability, such as Ofcom in the UK. At the other end are countries that seek to ensure that the supervisory bodies are broadly representative of the social and political currents of thought and interests in society, as is the case with the various broadcasting and administrative councils of the German public service broadcasters. The German Federal Constitutional Court has accepted the legitimacy of this representative approach, but has emphasized that the influence of the state must not dominate, and even nonmainstream voices should be afforded representation.⁴

Insulation from political influence is difficult, however, to realize in practice, particularly where there is parliamentary or executive oversight of the independent regulatory bodies. Moreover, across the Mediadem countries there is considerable variation in the terms on which individuals are appointed to the supervisory or administrative bodies, their required qualifications, the scope for reappointment, and protection from dismissal. As Psychogiopoulou et al. note, the public service media in the postcommunist countries of Bulgaria, Croatia, Romania, and Slovakia have, in particular, been subject to continuing political pressure and the measures taken to enhance their independence from governments and ruling elites have had only limited success. Independence cannot be created solely on the basis of formal structures and financial security, in relation to which Europe already provides many examples of good practice: political will and commitment is also required. This will can, however, be strengthened by the presence of a constitutional framework that endorses the democratic role of the media; the existence of independent judicial and administrative institutions that are able to articulate key principles designed shape the media environment, such as media pluralism; and a willingness by civil society organizations and the general public to support public service media organizations in the face of an increasingly hostile economic and political climate.

The two articles that focus on journalistic ethics explore how a professional mind-set and culture of responsible reporting can be built up and quickly destroyed over time. They suggest that in developing media policy we need to take a holistic approach, looking not only at major structural factors such as the degree to which media ownership or revenues are concentrated in a few hands but also at employment arrangements, the demographics of the workforce, education, and the cultural norms that shape the everyday environment in which journalists work. Thus, Lauk and Harro-Loit argue in their article,

⁴ *BVerfG, Urt. v. 25.3.2014—1 BvF 1/11, 1 BvF 4/11*, noted at German Federal Constitutional Court (2014).

"Journalistic Autonomy as a Professional Value and Element of Journalism Cultures: The European Perspective," that future European-wide media policy initiatives need to be attuned not only to the economic aspects of media markets but also to "the nature of particular journalism cultures, their symbiosis with national cultures, their historical development with or without disruptions, and the level of professional education."

The degree to which journalists can be said to be part of a profession is one of the variables that Hallin and Mancini used to distinguish media systems (Hallin & Mancini, 2004, p. 21). Autonomy from political and commercial constraints, the application of professional norms, and a public service orientation are all identified as indicating the existence of a profession. Lauk and Harro-Loit focus on the first of these and argue that for professional autonomy to be realized in practice, journalists need not only to be sensitive to the absence or restraint of autonomy at both the organizational and institutional (society) levels but also to understand the values that underpin the concept and give it moral weight. Although journalists clearly understand the various political and economic constraints that operate on their selection and presentation of material, research cited by the authors suggests that their understanding of professional autonomy as an overarching value is much more variable. This can result in reporting restrictions being considered normal, even inevitable, leaving journalists poorly equipped to determine when certain ethical lines have been crossed or to question the underlying decisions that lead to such an outcome.

Various factors can dull the journalists' sensitivity to ethical considerations, including limited opportunities to discuss such matters at the occupational level and insufficient or inadequate professional education. Thus, Lauk and Harro-Loit note that

in countries with long traditions of press freedom and of professional journalism and education, such as Finland, Denmark, and Belgium, journalists with an academic degree and longer work experience are more conscious of occupational values. They are able to reflect more critically on situations where their autonomy is endangered, and are better at withstanding external pressures.

They contrast this with the position in Slovakia and Romania, where journalism culture and education is limited, and autonomy may not be regarded as at all important. Both Slovakia and Romania, as well as Estonia, experienced not only a political rupture with the transition to democracy at the end of the 20th century but also a professional one, as the "old guard" of journalists were rapidly replaced with a new class of young reporters, working without "a value-based occupational ideology" to guide them.

A rather different rupture, though with some similar effects, caused by economic as opposed to political factors, can be detected in many European countries. Faced with the economic downturn in 2009, media firms in countries as diverse as Bulgaria, Romania, Spain, and the UK have cut costs by targeting their older and more expensive journalists for redundancy. The skills and experience of these journalists are consequently not passed down to young professionals in the newsroom and if "the critical mass of professionals who value independence and are able to endure economic pressures disappears . . . de-professionalization is an inevitable consequence."

The phone-hacking scandal in the UK, which led to the 2012 Report by Lord Justice Leveson into the culture and ethics of the British press, reconfirmed, if such confirmation was necessary, that a long free press tradition is perfectly compatible with unethical press practices (Leveson, 2012). In particular, the competitive nature of the workplace environment in certain British newspapers, notably the *News of the World*, encouraged journalists to do whatever it took to obtain the next big story. The pressure to continuously perform and provide popular, sensational, copy went largely unchecked by a more reflective workplace ethos, designed to support journalists in recognizing and maintaining professional standards. Unlike in Mediadem countries such as Germany, Finland, and Denmark, representatives of journalists' organizations do not have a guaranteed place on the governing institutions of the main post-Leveson press regulator, the Independent Press Standards Organisation (IPSO).⁵ Moreover, journalists are required to comply with the relevant Editors Code of Practice indirectly through the medium of their employment contract and may thus feel that they have little "ownership" of the Code itself. The nature of the "self" in press self-regulation thus varies markedly across Europe, incorporating to varying degrees different media interests as well as independent members designed to represent the public interest.

Faced with the risk of losing one's job, training and awareness can only offer so much protection. It is evident that a number of journalists in the UK recognized and were deeply concerned at the unprofessional practices they saw operating in certain papers, but felt unable to speak out about them (Harcup, 2014, pp. 16–17). Even in countries such as Finland, where Lauk and Harro-Loit suggest journalists have shown themselves able to withstand the pressures on their professional autonomy, a 2010 survey indicated that 53% of those who responded feared being made redundant.

It remains to be seen whether sufficient steps are taken in the UK to enable ethical concerns to be effectively addressed in the newsrooms of the most populist national titles in the future. The Leveson report proposed a number of steps that could assist in nudging the culture of newsrooms in the right direction, including provision by press regulators of a "whistleblowing hotline," enabling journalists to report unprofessional behavior on an anonymous basis, and the inclusion in journalists' employment contracts of a clause designed to protect them from disciplinary action for refusing to act unethically (Leveson, 2012, Vol. IV, 1809, recommendations 46 and 47). IPSO has established such a whistleblowing hotline and requires those entities it regulates to agree that no disciplinary action will be taken against an employee for using the hotline or for refusing to act contrary to the terms of the Editors' Code of Practice, it also requires those organizations it regulates to provide it with reports annually.⁶ The use of internal ombudsmen and readers' editors, along the lines employed by *The Guardian* newspaper in the UK, can

⁵ The 12 Board directors are composed of seven independent and five industry directors. The industry directors appear designed to represent certain sectors of the industry—magazines, regional newspapers, and so on—rather than certain actors such as journalists; see IPSO Articles of Association, Article 22, at <https://www.ipso.co.uk/media/1039/ipso-articles-of-association-2016.pdf>

⁶ See about the hotline (<https://www.ipso.co.uk/contact-ipso/journalists-whistleblowing-hotline/>) and employee protection the IPSO Scheme Membership Agreement, Clause 3.3 (<https://www.ipso.co.uk/media/1292/ipso-scheme-membership-agreement-2016-for-website.pdf>). IPSO has, however, been criticized for failing to fully implement the Leveson recommendations (see the Media Standards Trust, 2013).

also encourage wider self-reflection on matters other than revenue and audience reach (Leveson, 2012, pp. 1687–1688).⁷ This form of self-reflection is expected of many public service broadcasting organizations, such as the BBC, which not only evaluates the reliability and range of its coverage of complex political and scientific issues but also hosts programs such as “Feedback,” enabling the audience to raise concerns on air, in many instances with the producer concerned.⁸

The damaging impact of political and economic pressures on professional journalism is further illustrated by the article by Avădani, which considers recent changes to the media landscape in Romania. Avădani notes that considerable investment in the Romanian media between 2006 and 2008, from both within and outside the country, enhanced the position of journalists and led to the launch of new services. The impact of this investment was not always positive, however, and in the print sector new free services gradually pushed out a number of independent local papers with a track record of quality investigative journalism. In 2009 these arrangements began to unravel, and by 2012 most of the big media players, both domestic and foreign, were announcing job cuts. The only journalists relatively safe from the financial crisis were those employed in the public sector. Avădani argues that the precarious position of those journalists that remained rendered them more susceptible to economic and political pressures and many media outlets became, in effect, instruments of particular political parties.

Faced with the economic crisis, a wide range of employment arrangements were introduced in Romania, designed, first, to minimize the tax liabilities of the employers, leading to a loss of social protection for the employees, and, second, to allocate limited revenues more or less fairly among the workforce. Avădani notes how these “innovative” employment arrangements influence the way in which journalists operate, often to the detriment of the content they produce. Thus, agreements whereby journalists are paid a minimum wage, supplemented by an additional sum determined by the number of articles written, encourages “no-news type stories” and the prioritization of output over substance. Similarly, bonuses paid to reflect the number of clicks to related online advertising pushes journalists to think solely in terms of audience numbers rather than the value of the published content. Potentially the most corrupting of these systems is one where bonuses are awarded to journalists who attract sponsorship deals for the company. To address these concerns, certain publishers developed more sophisticated systems that combine fixed salaries with variable bonuses and prizes for both quantitative and qualitative output, enabling journalists to spend time on investigative journalism where they consider this to be merited without incurring a penalty.

There is a small glimmer of hope in this rather depressing narrative in that, against all the odds, Avădani observes that a number of journalists continue to strive to maintain their professional autonomy. Some have gone solo and produce their own online blogs, supported, where possible, by (limited) advertising; others rely on project grants from organizations such as the Romanian Centre for Investigative Journalism, but in both instances, sustainability remains a major problem. Others have given

⁷ See <http://www.theguardian.com/info/2013/sep/23/guardian-readers-editor>

⁸ See, for example, the Independent Panel Report, “BBC News Coverage of the European Union,” January 2005 (http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/govs/independentpanelreport.pdf) and the BBC Feedback website (<http://www.bbc.co.uk/programmes/b006slnx>).

up on journalism as a source of revenue altogether and instead earn their income by other means, publishing, in effect, as a hobby. Avădani notes that "the small scale of their efforts distinguishes them from the real media entrepreneurs while their publications, providing hard news and civic oversight, distinguish them from regular bloggers, specialized in commentaries and opinion pieces based on curated content."

Avădani's analysis provides a partial answer to the concerns expressed by Lauk and Harro-Loit that atomized bloggers or independent journalists are inevitably cut off from institutional systems of quality control: freedom from such institutional environments can actually empower journalists to maintain standards that are under increasing pressure in certain mainstream outfits. It also underlines the importance of opening up professional communities and regulatory bodies to independent journalists, particularly where membership offers reputational or legal advantages. Countries such as Denmark have already opened the way for independent online news providers to register with the Press Council.⁹ In the UK, membership of IPSO is open, *inter alia*, to entities that publish editorial content on electronic services that they operate, such as websites and apps, provided this is published in the UK or targets a UK audience.¹⁰ Formulations such as this could open up membership of professional organizations to individual, small-scale operators, provided the financial terms of membership are suitably calibrated. This is not to say, of course, that employment within a major public or private media organization cannot offer significant financial, legal, and technical resources that assist the production of quality journalism. In particular, such membership can offer a degree of insulation from lawsuits, or the threat thereof, by political and industry actors, which pose much greater challenges to independent journalists. The continuing commitment to responsible, pioneering journalism in Romania is, however, clearly insufficient to meet the democratic needs of Romanian citizens, and Avădani concludes that all stakeholders urgently need to consider how the political and economic forces that have proved so damaging in the past can be addressed in the future.

Lauk and Harro-Loit suggest that more could be done at the European level to encourage awareness of the social and cultural factors that support professional autonomy, building on the steps already taken in this respect. In the EU context, freedom of expression and respect for media pluralism are both recognized in Article 11 of the Charter of Fundamental Rights of the EU, and the High Level Group on Media Freedom and Pluralism, which, reported in January 2013, emphasized the importance of a working environment "which allows for free expression and provides the journalist with the assurance that they work free from pressure, interdictions, harassment, threats of even actual harm" (High Level Group on Media Freedom and Pluralism, 2013, p. 32). The Centre for Media Pluralism and Media Freedom at the European University Institute, with support from the EU, also organizes research in the field and training programs for journalists.¹¹ In 2010, the EU notably put pressure on Hungary to amend certain aspects of a

⁹ For discussion, see Fielden (2012), who also notes some of the complexities in terms of representation, funding, and engagement where independent members are admitted.

¹⁰ IPSO Regulations, Regulation 1

(<https://www.google.com/search?q=IPSO+Regulations%2C+Regulation+1+&ie=utf-8&oe=utf-8>).

¹¹ See <http://cmpf.eui.eu/Home.aspx>.

new media law in the light of both EU internal market provisions and Article 11 of the Charter of Fundamental Rights of the EU (European Commission, 2011).

The Council of Europe has had a long engagement with journalism, stemming from the protection afforded journalists by Article 10 of the European Convention on Human Rights (ECHR), which guarantees freedom of expression, access to information, and media pluralism, and through the adoption of recommendations and resolutions on journalism passed by its statutory bodies, notably Parliamentary Assembly Resolution 1003 of 1993 on the ethics of journalism. In the 2009 case of *Manole v. Moldova*, the ECtHR held that employed journalists and other media employees have a right to impart information under Article 10 ECHR and that constraints on that right need to be justified by an interest recognized in Article 10(2) ECHR and be shown to be proportionate.¹² An employed journalist can thus “claim to be directly affected by a general rule or policy applied by his employer which restricts journalistic freedom” and “any sanction or other measure taken by an employer against an employed journalist can amount to an interference with freedom of expression.”¹³ *Manole* underlines the fact that the Convention as an international agreement is binding on contracting states rather than private individuals, but a positive obligation on state parties to ensure that private actors respect Convention rights can also arise, notably in the context of Article 10 ECHR.¹⁴ There is as yet relatively little case law on this positive obligation, but it is clear that it includes an obligation to take steps to protect media organizations and journalists when threatened with violence by private individuals and could arguably extend to guaranteeing economic as well as physical security for journalists—for instance, protection from disciplinary action by an employer for seeking to report events accurately or for disclosing unethical media practices.¹⁵

The final article in the collection, by Cafaggi, Casarosa, and Prosser, engages further with this issue and explores the constitutional principles that shape media regulation. The authors consider to what extent fundamental rights and, in particular, the right to freedom of expression in Article 10 ECHR, serve to constrain state regulatory choices in the media field, in particular the decision to rely on public or private actors to enforce standards and protect rights. Private regulation ranges from the application by self-regulatory bodies of professional codes of conduct to the imposition of contractual terms by private media organizations on their users. But to what extent can the conformity of private rules of this type with fundamental rights be evaluated by international or domestic courts? In the context of the ECHR, professional rules determined by an independent body with powers delegated by Parliament have been held to constitute “law” within the meaning of Article 10(2) ECHR, and thus be subject to review for conformity with fundamental rights, notably the right to freedom of expression.¹⁶ Recourse to professional

¹² *Manole v. Moldova* (see Note 3).

¹³ *Manole v. Moldova*, para. 103 (see Note 3).

¹⁴ *Manole v. Moldova*, para. 99 (see Note 3).

¹⁵ For suggestive rulings, see *Özgür Gündem v. Turkey*, App. No. 23144/93, March 16, 2000; *Fuentes Bobo v. Spain*, App. No. 39293/98, 29 February 2000; and *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, App. No. 38433/09, June 7, 2012.

¹⁶ *Barthold v. Federal Republic of Germany*, App. No. 8734/79, A 90, March 25, 1985.

codes of conduct as a guide to responsible reporting has also been accepted by the ECtHR when considering the application of statute law to the actions of journalists under Article 10 ECHR.¹⁷

At the EU level, EU law, including state measures implementing EU law, must comply with the terms of the EU Charter of Fundamental Rights.¹⁸ Any delegation of competence to a private regulatory body within the field of EU law has therefore to comply with the protection afforded freedom of expression and the right to information in Article 11 of the Charter. The Court of Justice has also held that the basic EU treaty guarantee of free movement of services applies not only to public authorities but also to “rules of any other nature aimed at regulating gainful employment and the provision of services in a collective manner” and can thus extend to rules adopted by certain private regulatory bodies.¹⁹ Such bodies may also be caught by the competition law rules in the Treaty on the Functioning of the European, notably articles 101-102.²⁰ EU law can, therefore, constrain the terms on which private as well as state regulation can proceed in certain contexts. The legitimacy of co and self-regulatory regimes in facilitating the implementation of EU law in the media sector (subject therefore to the application of fundamental rights) has been expressly recognized in Article 4.7 of the Audiovisual Media Services Directive, which specifically concerns ‘television like’ media services, provided the regimes are broadly accepted by the main stakeholders and provide for effective enforcement.²¹

At the state level, the authors found that domestic constitutions in the countries studied most commonly address the media sector by requiring or legitimating public intervention to regulate the broadcasting sector or to establish public service media. The legitimacy of state regulation specifically addressed to the private media sector is rarely addressed, though there is frequently recognition that the state has competence to restrict freedom of expression in order to pursue certain general interest goals or to protect other rights, for instance by prohibiting hate speech. The role of private or state regulation in areas beyond broadcasting or public service media thus tends not to be addressed. Only two of the countries studied, Greece and Spain, make explicit reference to the use of independent regulatory bodies or public agencies in the media field in their constitutions. Given the growing reliance on private regulation online, even at the level of the individual firm, the authors argue that further consideration needs to be given to its constitutional implications and developing role. They also suggest that there is room for further exchange of good practice and coordination of regulatory approaches at the European level,

¹⁷ *Stoll v. Switzerland*, App. No. 69698/01, December 10, 2007.

¹⁸ Article 51 of the Charter of Fundamental Rights of the European Union.

¹⁹ See, for example, C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, [2006] ECR I-6991.

²⁰ See C-519/04 P, *David Meca-Medina and Igor Majcen v. Commission of the European Communities*, and Case C-309/99, *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten*, interveners: *Raad van de Balies van de Europese Gemeenschap*, [2002] ECR I-1577.

²¹ Directive 2010/13/EU of the European Parliament and of the Council of March 10, 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in member states concerning the provision of audiovisual media services (Audiovisual Media Services Directive), [2010] OJ L95/1.

possibly through an enhanced role for EPRA (the European Platform of Regulatory Authorities), and, one might now add, the European Regulators Group for Audiovisual Media Services, established in February 2014.²² Alongside adapting public service media to the converging media environment and promoting the development of facilities within and beyond the workplace to support ethical journalism, the coordinated development of criteria and methodologies to assess the legitimacy and effectiveness of private regulation is undoubtedly one of the major challenges facing European states at the start of the 21st century.

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²² Commission Decision of 3.2.2014 on establishing the European Regulators Group for Audiovisual Media Services, C (2014) 462 final.

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